



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

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ATTORNEY GENERAL  
OF WASHINGTON

December 29, 2005

Sent by First Class Mail

The Honorable Rob McKenna  
Attorney General, State of Washington  
1125 Washington Street SE  
Olympia, WA 98504-0100

Re: Proposed Public Records Model Rules

Dear Attorney General McKenna:

Thank you for providing this opportunity to comment on the Public Records Model Rules. The Department of Financial Institutions respectfully submits the following comments:

General Comments:

1. I have never seen rules written with codified comment sections interspersed throughout. The format is a bit cumbersome and leads to a great deal of redundancy. At the very least the text needs an introduction explaining the format. I would put WAC 44-14-00002 first so that the reader understands the format from the very beginning.
2. Most agencies are now writing their rules following a "Plain Talk" or "Clear rule writing" format in order to make it easier for the general public to read. I would suggest you consider that format in the future.
3. Rules are generally intended to supplement or define a statute. Many of the comment sections just restate the statute and provide very little guidance.
4. The rules have too many "shalls". I am concerned about the possible liability that could create for agencies.
5. In many cases, the public records officer isn't the person responsible for the initial response to a request for records. With this in mind, you might consider replacing the appropriate references to the "public records officer" with the "agency" or some other reference to an agency employee.

Specific Comments:

1. Page 1, line 9, I suggest you change “establish” to “promote. Use of the word “establish” makes it appear as if all agencies need to create a culture of compliance. Many agencies have been compliant for years.
2. WAC 44-14-01002, WAC 44-14-01003 and WAC 44-14-02001. These are good examples of comment sections that are almost solely a restatement of the statute. As I stated above in the general comment section, to restate the statute seems unnecessary and is not helpful in providing guidance. I could site a number of other sections with the same issue but I am sure you get the point.
3. WAC 44-14-030 Availability of Public Records. This section is good except it has too many “shalls” in subsection (3). Concerning subsection (d), I would suggest you let each agency decide how it will respond to oral requests. If the agency response is an immediate production of the requested records, a confirmation of receipt of the request and the substance of it would not be necessary.
4. WAC 44-14-03005 This section is a bit wordy. Why not just state that e-mails must be retained under the same schedule as paper documents with identical content.
5. WAC 44-14-03006 As stated above, it should be left up to an agency how to process oral requests.
6. WAC 44-14-040 Processing of public records requests –general. You need to recognize throughout this rule that, in many cases, the public records officers do not process the record requests. Shouldn’t Subsection (2) include “denying” the record request? Subsection 6(b) will be very helpful. Again, under subsection (9), if the public records request has been fulfilled, why would the public records officer have to indicate in writing that the agency has completed a diligent search for the records? That is implied. For subsection (10), I hope the operable language is the agency “becoming aware” because otherwise this would be a nightmare, especially for a large agency. How long would this requirement continue? If you want to encourage this, you might consider putting it into a comment, rather than a rule.
7. WAC 44-14-04003 I suggest you delete the last sentence in subsection (9). While some failures to provide records within the agency’s estimated time period may be a “denial of access”, not all are. For example, if an agency estimates that it will take 10 days to provide the record and it isn’t able to do so for 15, I doubt anyone could argue a “denial of access” unless there was some reason that the 10 days was critical.

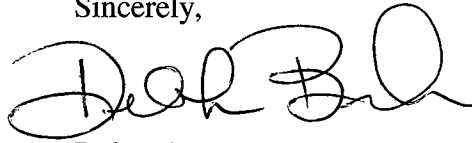
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8. WAC 44-14-04007 As I stated earlier, it will be very difficult, if not impossible, for an agency to keep track of all its requests in order to provide later-discovered documents. Unless each agency employee is aware of a request for documents, when the documents are discovered they would have no reason to know that the documents should be provided. Without some standard of awareness, this could impute knowledge or intent when none is present.
9. WAC 44-14-050 Processing of public records requests – Electronic records. Because an agency is not required to provide customized access to its databases, I suggest you insert “If an agency will be providing customized access to its databases” before the text in subsection 3(f).
10. WAC 44-14-07003 Many agencies scan their records as part of record management. I suggest you clarify whether an agency can charge a scanning fee for proving already scanned documents to a requestor.
11. WAC 44-14-080 Review of denials of public records. Because not all denials are made by the public records officer, I suggest you replace “public records officer” in the second sentence of subsection (1) with “agency” or some other description like “agency employee”.

We appreciate the work that went into the development of these rules and hope that these comments are helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Bortner", with a stylized flourish at the end.

Deborah Bortner  
Regulatory Counsel